

ORAL ARGUMENT NOT YET SCHEDULED

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 23-1044

JOHN DOE,

Petitioner,

v.

THE SECURITIES AND

EXCHANGE COMMISSION,

Respondent.

**REVIEW OF THE SECURITY AND EXCHANGE
COMMISSION'S FINAL WHISTLEBLOWER DENIAL**

BRIEF FOR PETITIONER

WASHINGTON GLOBAL LAW GROUP

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Dated: June 12, 2023

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Counsel for Petitioner [REDACTED] certifies:

1. Parties and Amici

Petitioner [REDACTED] (“Claimant”) is the only party who, to his knowledge, is seeking this Court’s review of the final whistleblower denial decision of the Security and Exchange Commission (“Commission”). The Respondent is the Commission. There are no intervenors or amici.

2. Rulings Under Review

The decision at issue before the Court is the final order of the Commission entered on [REDACTED] in whistleblower award proceeding file no. [REDACTED]

[REDACTED]

[REDACTED], which denied Claimant’s whistleblower application.

3. Related cases

There are no related cases on appeal.

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[REDACTED]

[REDACTED]

22, 23, 26

[REDACTED]

[REDACTED]

12, 13, 17, 18, 22, 25, 26

OTHER AUTHORITIES

Frank Easterbrook & Daniel Fischel, *The Economic Structure of
Corporate Law* (Harvard Univ. Press 1991)

19

[REDACTED]

[REDACTED]

25

[REDACTED]

[REDACTED]

25

* Indicates authority principally relied upon

GLOSSARY OF ABBREVIATIONS

The following abbreviations are used in this brief:¹

Claimant	[REDACTED]
Commission	Securities and Exchange Commission

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ For clarity and consistency, and in accord with D.C. Circuit Rule 28(d), this brief uses the same party designations used in the agency proceeding (*i.e.*, “Claimant” and “Commission”). And if this brief uses an abbreviation for an individual or corporate entity, that abbreviation is also the same as those used in the agency proceeding [REDACTED]

STATEMENT OF JURISDICTION

Claimant appeals the Commission's final order pursuant to this Court's original jurisdiction under 15 U.S.C § 78u-6(f) and 17 C.F.R. § 240.21F-13.

STATEMENT OF STANDING

Claimant has standing for this appeal under 15 U.S.C § 78u-6(f), 17 C.F.R. § 240.21F-13, and 5 U.S.C. § 702, as an aggrieved person because the Commission denied his whistleblower award application.

PERTINENT STATUTES AND REGULATIONS

15 U.S.C. § 78u-6(a)(3)

17 C.F.R. § 240.21F-4(b)(4)(ii)

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the Commission err when it denied Claimant's award application based on the Commission's conclusion that Claimant had not provided "original information" [REDACTED]?

STATEMENT OF THE CASE

I. INTRODUCTION

This whistleblower appeal arises from a [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Claimant submitted a whistleblower award application for recognition of his services. The Commission, in a fatally flawed decision, denied Claimant's application. The Commission based its decision on a wholly irrational conclusion that Claimant should not have made his tip because [REDACTED]

[REDACTED]

The Commission's decision was wholly irrational. In reality, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

II. PROCEEDINGS BELOW

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Claimant timely filed a whistleblower claim the next month. [REDACTED] the Commission issued a preliminary determination denying Claimant's application. [REDACTED]. The following month, Claimant submitted a timely response contesting the Commission's preliminary determination. [REDACTED] the Commission issued a final order denying Claimant's application. [REDACTED] Claimant timely petitioned this Court to review that final order.

III. STATEMENT OF FACTS

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[illegible]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

C. Claimant blows the whistle

Claimant was another innocent party harmed by [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] in Claimant's response to the Commission's subsequent preliminary determination denying his whistleblower award application, Claimant notes [REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

D. The investigation and prosecution

Based on Claimant's tip, as noted, the Commission launched an investigation [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

Thereafter, Claimant also provided substantial assistance to the Commission in its investigation. He sat for voluntary interviews, both in person and by phone.

-10-

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] the district court entered a consent judgment against [REDACTED] which included a permanent injunction, disgorgement, and a civil penalty. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] the district court entered the consent judgment against [REDACTED] agreed to pay damages of [REDACTED]
[REDACTED] the Commission voluntarily dismissed [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] the district court entered an order against [REDACTED]
[REDACTED] The order directed a total damages award of approximately: [REDACTED]
[REDACTED]

E. The Commission denies Claimant's whistleblower claim

As this was transpiring, the Commission issued a notice of covered action inviting whistleblower award applications, which Claimant timely did. [REDACTED]

[REDACTED] Commission issued a preliminary determination denying Claimant's claim. [REDACTED]

The Commission's preliminary determination erroneously concluded that Claimant [REDACTED]

[REDACTED] because, the Commission reasoned, [REDACTED]

[REDACTED]

The Commission's decision, however, failed to substantively address, much less correctly apply, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

And in this instance, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

After Claimant received the Commission's preliminary determination, he promptly requested reconsideration of that determination. In his request, Claimant pointed out the Commission's error, observing that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Claimant's sworn declaration, which he attached to his request for reconsideration, likewise adds, "[REDACTED]"

[REDACTED]

[REDACTED]

[REDACTED]

In January 2023, the Commission issued a final order denying Claimant's whistleblower award application. [REDACTED] In pertinent part, the Commission's

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

final order acknowledges [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

JA097. But the Commission's final order erroneously concluded that "[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. For the following reasons, the Commission's conclusory reasoning here is wholly irrational and its proffered explanation nonsensical.

SUMMARY OF THE ARGUMENT

The Commission's conclusion [REDACTED]

[REDACTED] was arbitrary, capricious, an abuse of discretion, and not in accordance with the law.

STANDARD OF REVIEW

This Court reviews the Commission's decision "in accordance with section 706 of [the Administrative Procedure Act]." 15 U.S.C. § 78u-6(f) (citing 5 U.S.C. § 706). Therefore, the Commission's decision must be reversed when it is

“arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A); *see also Ross v. SEC*, 34 F.4th 1114, 1118 (D.C. Cir. 2022). And for the Commission’s decision to be upheld, the Commission “must have examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Johnston v. SEC*, 49 F.4th 569, 575 (D.C. Cir. 2022) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)) (quotation marks and brackets omitted). Here, the Commission’s decision fails to meet this standard and must therefore be reversed.

ARGUMENT

I. The Commission Abused Its Discretion When It Concluded that Claimant Had Not Provided “Original Information”

A. The Original Information Rule

“Under the Dodd-Frank Wall Street Reform and Consumer Protection Act,” this Court notes, “Congress created a whistleblower award program that provides monetary incentives to individuals with knowledge of securities violations to assist the government in identifying and prosecuting the violations.” *Ross v. SEC*, 34 F.4th 1114, 1118 (D.C. Cir. 2022) (citation omitted). This Court explains, “the Commission is authorized to give monetary awards to ‘whistleblowers who voluntarily provided *original information* to the Commission that led to the

[illegible]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. This

conclusion is contrary to blackletter law and basic logic. *See, e.g., Burnet v. Clark*, 287 U.S. 410, 415 (1932) (“A corporation and its stockholders are generally to be treated as separate entities.”); *see generally* Frank Easterbrook & Daniel Fischel, *The Economic Structure of Corporate Law, passim* (Harvard Univ. Press 1991) (discussing corporate separateness). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Commission's contrary conclusion is irrational and its proffered "explanations"—if they can even fairly be called that—are wholly unsatisfactory.

See Johnson, 49 F.4th at 575 (noting that the Commission must articulate "a satisfactory explanation for its decision"). The Commission's first proffered explanation, as noted, is that [REDACTED]

[REDACTED] For reasons discussed above, this is plainly wrong.

The Commission's second proffered explanation is even more unsatisfactory. The Commission asserts, as noted, that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2. [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], neither of which the Commission's final
order considered when it erroneously rejected [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

Just so here. For the reasons discussed above, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In sum, Claimant's whistleblower submission was [REDACTED]

[REDACTED]

[REDACTED] And the Commission's contrary conclusion was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law. This Court should therefore reverse that decision.

3.

Finally,

██████████ persuasive authority from other jurisdictions further reinforces that Claimant’s disclosure was not only permissible— but it was the right thing to do.

Thus, the fundamental policy considerations weigh even more strongly in

Claimant's favor. As Claimant explained in his whistleblower submission, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] For reasons discussed above, just so here.

That hindsight has since revealed [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Again, just so here. [REDACTED]

[REDACTED]

[REDACTED] And the Commission's contrary conclusion was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law. This Court should therefore reverse that decision.

CONCLUSION

For the foregoing reasons, Claimant respectfully requests that this Court reverse the Commission's final order denying Petitioner's whistleblower award application and remand the case to the Commission for determination of the proper amount of the award.

Respectfully submitted,

/s/ Max F. Maccoby

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Dated: June 12, 2023

Counsel for Petitioner [REDACTED]

CERTIFICATE OF COMPLIANCE

In accord with Federal Rules of Appellate Procedure 28(a)(10) 32(g), I
certify that:

1. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts exempted by Fed. R. App. P. 32(f), it contains 5,909 words, including footnotes; and
2. This document complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 21(d) and 32(c) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman.

/s/ Max Maccoby

Dated: June 12, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of June, a copy of the
foregoing was served by electronic mail to:

William K. Shirey
U.S. Securities and Exchange Commission
100 F. St., N.E.
Washington, D.C. 20549

/s/ Max Maccoby

PERTINENT STATUTES, REGULATIONS, AND RULES

15 U.S.C. § 78u-6(a)(3)

The term “original information” means information that:

- (A) is derived from the independent knowledge or analysis of a whistleblower;
- (B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and
- (C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]